

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

KEURIG, INCORPORATED,

Plaintiff,

v.

KRAFT FOODS GLOBAL, INC.,
TASSIMO CORPORATION, and
KRAFT FOODS INC.,

Defendants.

C.A. No. 07-17 (GMS)

JURY TRIAL DEMANDED

PUBLIC VERSION

**KRAFT'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION IN LIMINE TO
PRECLUDE THE TESTIMONY OF TED LINGLE**

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Dated: August 25, 2008
Public Version Dated: September 2, 2008
880806 / 31118

The basis for Kraft's Motion to Exclude the Testimony of Ted Lingle is simple. Keurig offers his testimony for impermissible purposes – claim construction of the term “beverage” and to impose criteria not specified in the '762 Patent. This is a usurpation of the Court's role. Furthermore, far from assisting the jury in its factual determinations as Keurig suggests, Mr. Lingle's testimony would mislead the jury as to the requirements of Claim 1 of the patent.

As Keurig must, it admits the term “beverage” must be given its plain and ordinary meaning in this patent infringement action. If Keurig wanted to offer a different definition of “beverage,” it should have done so during *Markman*. See, e.g., *O2 Micro Int'l Ltd. v. Beyond Innovation Tech.*, 521 F.3d 1351, 1360 (Fed. Cir. 2008) (when the parties raise an actual dispute about the scope of claims, the Court must resolve that dispute during claim construction). Keurig does not dispute that it failed to request and obtain a claim construction from this Court on the term “beverage.”¹ Rather, Keurig now seeks to have Mr. Lingle provide “expert” testimony as to the ordinary meaning of “beverage.” It erroneously contends that the ordinary meaning of “beverage” is a factual question for the jury and that Mr. Lingle will assist the jury in making that “factual” determination. But in actuality Keurig is attempting to have Mr. Lingle give the word “beverage” a specialized meaning and impose criteria for whether a drink meets his claim construction of “beverage.”

The ordinary meaning of beverage is clear: a “beverage” is a “liquid for drink; esp. such liquid other than water (as tea, milk, fruit juice, beer) usually prepared (as by flavoring, heating,

¹ Keurig claims that it raised the issue of the term beverage in August 2007 in its responses to Kraft's invalidity contentions. Opp'n at 3. That claim is disingenuous. While the word “beverage” appears in the responses, Keurig's discussion concerned whether the lid was pierceable to accommodate an inflow of liquid and an outflow of beverage. Keurig never asserted that Kenco Singles cartridge did not produce a “beverage.” Keurig's undermines its position on the same page of its opposition. Right after Keurig claims that in August 2007 it explained that the Kenco Singles cartridges would not work to make a beverage, it then states it was not until January 2008 that it tested the Singles cartridges.

mixing) before being consumed.” WEBSTER THIRD NEW INTERNATIONAL DICTIONARY (2002); *see also Miken Composites, L.L.C. v. Wilson Sporting Goods Co.*, 515 F.3d 1331, 1337 (Fed. Cir. 2008) (supporting the use of the customary meaning of claim terms). Absent “expert” testimony, any jury will understand that familiar meaning. But Lingle testified that he believed “beverage” had a meaning different from the ordinary meaning. Lingle Depo. Tr. (Ex. 1) at 64. Dr. Slocum also understood that Lingle proposed a specialized definition of “beverage.” Slocum Depo. Tr. (Ex. 2) at 8. Lingle ultimately defined “beverage” as “a brewed liquid (e.g., coffee) of sufficient strength and with adequate flavor and aroma profile so as to be accepted by consumers for purchase and consumption.” Lingle Rebuttal Rep. (Ex. 3) at 2. This definition is not even remotely similar to the ordinary meaning of “beverage.” Allowing Mr. Lingle to testify will mislead the jury into believing it should use Mr. Lingle’s specialized meaning, not the ordinary meaning of “beverage.”

Lingle’s definition of “beverage” – coupled with a close examination of his rebuttal report – confirms that Keurig is attempting to improperly offer claim construction in the form of expert testimony. In support of his definition, Mr. Lingle cites to a statement about widespread acceptance the prior art had in the marketplace. He is clearly opining on the meaning of “beverage” in light of the specification. And, it is undisputed that construing a claim term in light of the patent specification is the sole province of the court. *See, e.g., O2 Micro*, 521 F.3d at 1360. For this reason alone, Kraft’s motion to exclude should be granted.²

² In addition, Lingle’s testimony on invalidity and infringement should be excluded. Keurig does not dispute that Lingle lacks the technical expertise in the art of the ‘762 Patent. Rather, Keurig states only that his “experience in coffee brewing, including as a coffee ‘cupper’ and renowned cupping trainer” somehow qualifies him to as an expert on the Singles cartridge. The fact that Lingle may be able to differentiate taste and aroma of one cup of coffee from another does not mean that he can opine on issues related to the structures of beverage filter cartridges.

Keurig's arguments find little support in the cited cases. *Cordis Corp. v. Medtronic AVE, Inc.* does not support the argument that an expert can construe claim language or that it is a question of fact.³ See 511 F.3d 1157 (Fed. Cir. 2008). If anything, *Cordis* supports Kraft's position that claim construction is a matter of law that is the exclusive province of the courts. There, the Federal Circuit reversed the trial court's claim construction, substituted its own, and rejected AVE's positions that contravened that claim construction. The *Talecris* case is likewise inapposite. *Talecris* does not pertain to whether an expert can usurp the role of the court in claim construction. Rather, it pertains to the issue of indefiniteness, which is a factual issue. See 510 F. Supp. 2d 356, 360 (D. Del. 2007).

Lastly, the *Agere* case does not support Keurig's position either, but rather supports Kraft's position. Therein, the court instructed the jury that "to the extent that words are not defined as a matter of law then obviously they have the ordinary meaning that you [the jury] understand the words to mean." 2005 WL 2994702, *11 (E.D. Pa. 2005). The court reviewed the expert's testimony to ensure that his testimony did not offer an impermissible claim construction. See *id.* at *12. This suggests that an expert cannot provide claim construction, even with regard to words that are to be given their ordinary meaning.

CONCLUSION

For the aforementioned reasons, Kraft's Motion *in Limine* to exclude the testimony of Mr. Ted Lingle should be granted.

³ Furthermore, the *Cordis* panel did not hold that the appropriate methodology for measuring "substantially uniform thickness" is a question of fact. The court stated, "Even if the issue of the proper methodology for measurement should have been treated as a pure question of law, however, we reject AVE's argument that the trial court should have adopted AVE's methodology in determining how the wall thickness should be measured." 511 F.3d at 1168-69.

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Dated: August 25, 2008
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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

CERTIFICATE OF SERVICE

I, David E. Moore, hereby certify that on September 2, 2008, the attached document was electronically filed with the Clerk of the Court using CM/ECF which will send notification to the registered attorney(s) of record that the document has been filed and is available for viewing and downloading.

I further certify that on September 2, 2008, the attached document was Electronically Mailed to the following person(s):

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EXHIBIT 1

1 UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF DELAWARE

-----X
3 KEURIG, INCORPORATED,

4 Plaintiff,

5 VS

6 KRAFT FOODS GLOBAL, INC., TASSIMO
CORPORATION, and KRAFT FOODS, INC.,

7
Defendants.

8
Civil Action No. 07-CV-0017-GMS

9 -----X

10
11
12 VIDEOTAPED DEPOSITION OF TED R. LINGLE

13 Friday, June 27, 2008

14 9:11 a.m. - 2:05 p.m.

15 WOLF, GREENFIELD & SACKS, P.C.

16 600 Atlantic Avenue

17 Boston, Massachusetts 02210

18
19 Court Reporter: Loretta Hennessey, RDR, CRR

20
21
22
23 ELLEN GRAUER COURT REPORTING CO. LLC

126 East 56th Street, Fifth Floor

24 New York, New York 10022

212-750-6434

25 REF: 87840

1 LINGLE

2 it's based on the, my understanding of what the
3 patent says.

4 Q. If you would turn to the first, not the
5 coverage page but the first page of this rebuttal
6 report. Okay. Are you there?

7 A. Uh-huh.

8 Q. Okay. Under "Summary of Opinion," it
9 says, on the fourth line -- well, let's read the
10 whole thing. "In my opinion, piercing the foil lid
11 of a Singles cartridge containing ground coffee
12 (like those that Mr. Taylor and the Kraft employees
13 tested) and injecting a quantity of water into the
14 cartridge (as opposed to making use of the
15 pre-molded inlet hole on the side of the cartridge
16 opposite the foil lid)," and this is what I'm
17 interested in, "does not produce a 'beverage' within
18 the meaning of Keurig's '762 patent." Do you see
19 that?

20 A. Uh-huh.

21 Q. You put the word "beverage" in quotations,
22 and you say "'beverage' within the meaning of
23 Keurig's '762 patent." Do you see that?
24 Does the word "beverage" in Claim 1 of the patent,
25 where it appears, have a special meaning that's

1 LINGLE

2 different than the ordinary and usual meaning of
3 that word?

4 A. I think that is defined in the patent as a
5 brewed beverage.

6 Q. Right.

7 A. Okay? And so I wanted to put the word in
8 quotes to emphasize that we're using this word,
9 which could be generic, in a very specific
10 application, and that's brewed beverage.

11 Q. Okay.

12 A. Again, brewed coffee beverage.

13 Q. Wait. Let's take this in parts.

14 A. Okay.

15 Q. You say, so it's not used in its generic
16 sense. Do you mean its ordinary sense?

17 A. Ordinary --

18 MR. RADER: Objection to form.

19 Q. Excuse me?

20 A. Ordinary in what those of us who are
21 consumers would interpret that to mean, consumers of
22 a beverage, one that we purchased.

23 Q. I'm sorry, and this is not your fault, I
24 just didn't understand what you just said.

25 A. To me the word "beverage" in this

1 LINGLE

2 application, it means one that the average person
3 would go out on a commercial level and purchase
4 either for home use or for consumption away from
5 home.

6 Q. Okay. My question to you is, does
7 "beverage" have a meaning in the patent that is
8 different than its ordinary meaning?

9 A. I believe it does.

10 Q. Okay. What do you believe the ordinary
11 meaning of "beverage" is?

12 A. The ordinary meaning would be a product
13 that could be either sold or consumed for a person's
14 enjoyment.

15 Q. So it's --

16 A. I mean, there would be certain categories
17 I would exclude. I wouldn't include tap water in
18 the context of a beverage.

19 Q. So you think the word "beverage" has a
20 commercial, has a commercial connotation?

21 A. When I read the patent, then I was
22 assuming, my assumption is the average person
23 reading that patent would assume this was a beverage
24 for commercial application.

25 Q. Okay. And what is the basis of that

1 LINGLE

2 assumption?

3 A. That it basically talked about a brewed
4 beverage, meaning one that was prepared in a way
5 that involved controlled strength and controlled
6 extraction in order to meet some beverage standard,
7 either tea or coffee or whatever.

8 Q. And what is the word -- what is it in the
9 words "brewed beverage" that to you connotes
10 controlled, some type of controlled standard?

11 A. That's basically the science of coffee
12 brewing is controlling the extraction, controlling
13 the strength. It's not a random process, it's a
14 controlled process.

15 Q. Okay. And is there anything explicit in
16 the patent that you point to that says it has to be
17 commercially acceptable?

18 A. In the patent it uses the phrase
19 "widespread acceptance."

20 Q. Right.

21 A. Okay? And when you're reading a patent
22 about a product that's designed to commercially
23 produce a beverage, then I think it's fair to assume
24 that that's the intent of those words.

25 Q. Okay. I'm sorry, you just said when

EXHIBIT 2

1 UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF DELAWARE

3 ----- x
4 KEURIG, INCORPORATED,

5 Plaintiff,

6 v.

7 KRAFT FOODS GLOBAL, INC., TASSIMO CORPORATION, and
8 KRAFT FOODS INC.,

9 Defendants.
10

11 Civil Action No. 07-CV-0017-GMS
12 ----- x

13 VIDEOTAPED DEPOSITION OF ALEXANDER H. SLOCUM

14 Wednesday, June 11, 2008

15 9:10 a.m. to 5:00 p.m.

16 WOLF, GREENFIELD & SACKS, P.C.

17 600 Atlantic Avenue

18 Boston, Massachusetts

19 Reporter: Marianne R. Wharram, CSR/RPR
20

21
22
23 ELLEN GRAUER COURT REPORTING CO. LLC

24 126 East 56th Street, Fifth Floor

25 New York, New York 10022

212-750-6434

REF: 87765

SLOCUM

performed in this case?

A. So I was asked as an expert to look at the patent-in-suit -- excuse me -- and answer whatever questions I could for them in terms of technically what is happening in the use of -- for example, specifically in the expert report, I -- I believe you have a copy of, these Kenco Singles cartridges and how they function, and then my report details all the questions I answered and the work I did on them.

Q. Let's break that down a little bit. When did you start working on this case?

A. Sometime last year. I -- I don't recall the exact date.

Q. Was it in the winter of last year, the fall, the spring, fall?

A. Well, I believe it was last fall I started the experiments.

Q. You started the experiments, but you said you studied the patent. When did you study the patent?

A. I don't -- I don't recall the exact date.

Q. Well, I'm not asking you the exact date. I'm asking you the approximate date.

SLOCUM

A. It was -- It was last year, I think fall-ish time.

Q. And how much time did you spend studying the patent?

A. When you say studying the patent, I read it through, tried to understand all the elements, and I probably spent on that part -- a wild guess is maybe a day total in terms of actually just reading the patent and understanding it well.

Q. You say that part. Is there any other part of your study of the patent?

A. Everything in conjunction with my report, because I would refer back to the patent to understand the terms, you know, the Court's claim construction that was issued. I had to make sure that when I was looking at, for example, the Kenco Singles cartridges and performing and designing my tests that what I did would be able to address the issues that Mr. Rader asked me to look at.

Q. And in studying the patent, did you come to some conclusions about what the terms in the patent mean?

A. I believe I understand what the terms mean and also what the Court told me in the

SLOCUM

construction, or claim construction, what different terms mean. That's what I have to ultimately abide by is what is the Court's claim construction.

Q. In your expert report, you opine about the meaning of the word beverage; is that correct?

MR. RADER: Objection to the form. You can answer.

A. Well, my understanding for the term beverage -- because I'm not an expert in that area, I relied -- the Court itself didn't give me an exact definition of what beverage is. I have to refer back explicitly to that document, but in that respect, I relied on Mr. Lingle, who is an acknowledged expert in the field of coffee beverages. And then, when I actually ran the various tests in various scenarios, I also, because I'm a fairly avid coffee drinker, would then taste the stuff made by the various ways I did.

Q. (BY MR. SCHLITZ) But when you read the patent, what was your understanding? Before -- when did you speak to Mr. Lingle?

A. I first met Mr. Lingle a couple of months ago when I did my extensive tests with the hot water to actually attempt to create the beverage.

SLOCUM

Prior to that time, I had done some preliminary tests, also using hot water, and I don't recall if the Court -- I had the claim construction at the time. I'm not sure it would have made a difference at that point, because again, the Court doesn't define beverage -- and I have to look again -- in terms of a scientific definition, but prior to that, my definition, to answer your question, of beverage, if I make -- excuse me -- coffee using a product in the way it's supposed to be used, and then I make coffee with the same product in the way that I was asked to test it, they should taste the same if it's making a beverage, just to my own palate.

Q. So that's your -- that was your definition of beverage, when you read the patent?

MR. RADER: Objection to the form. Mischaracterized, but you can answer.

Q. (BY MR. SCHLITZ) I don't want to mischaracterize your testimony, Doctor. I'm just trying to understand. What you just said is your -- was your understanding of beverage; is that correct?

A. Correct. You said what was my

EXHIBIT 3

**THIS EXHIBIT HAS BEEN
REDACTED IN ITS ENTIRETY**